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TAN SIN WAH v. YEOW SIOW LIN

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[DIVORCE PETITION NO: 33-64-2007]
6 MAY 2015

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FAMILY LAW: *Maintenance – Children – Application for variation of decree nisi order dissolving marriage – Reduction of payment of monthly maintenance – Allegation by applicant/husband that financial position had substantially deteriorated – Averment that wife's financial wealth had considerably improved – Whether claims substantiated by documentary evidence – Whether applicant/husband made specific reference to relevant laws that could form basis of application – Whether affidavits contained scandalous statements – Law Reform (Marriage and Divorce) Act 1976*

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EVIDENCE: *Burden of proof – Civil action – Divorce – Application for variation of decree nisi order dissolving marriage – Reduction of payment of monthly maintenance for children – Allegation by applicant/husband that financial position had substantially deteriorated – Averment that wife's financial wealth had considerably improved – Burden of proof to substantiate claims – Whether on applicant/husband – Whether applicant/husband adduced documentary evidence to support claims*

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In this application, the applicant sought a variation of the *decree nisi* order earlier granted dissolving his marriage to the respondent, in that, the applicant's obligation to make monthly maintenance payments for their children be reduced from RM5,000 to RM500. According to the applicant, his financial position had substantially deteriorated following the termination of his employment with Kulai Farm Sdn Bhd. Consequently, he could no longer afford to pay RM5,000 in monthly maintenance of the children. The applicant further averred that the respondent's financial health had considerably improved. In support of his contentions, the applicant presented exhibits of results of company searches concerning the directorships and shareholdings of the respondent. However, the applicant did not offer any document to substantiate his own earnings and sources of income. In challenging the applicant's application, the respondent raised preliminary objections that (i) the application failed to make specific reference to the relevant laws that could form the basis of the application other than the mere mention of s. 52 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'); and (ii) certain statements in the affidavits were scandalous.

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Held (dismissing applicant's application with costs):

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(1) Even though the respondent's objection was not without merit, the underlying legal basis of the applicant's application to vary the *decree nisi* was reasonably apparent and fairly easily discerned from a review of the

application and supporting affidavits of the applicant. It had caused no prejudice to the respondent and neither was the respondent misled. (para 4)

(2) There was certainly a shortcoming by the applicant in the drafting of the application but the court was minded to give due regard to the justice of the case and draw on the principles underlying O. 1A and O. 2 of the Rules of Court 2012 ('ROC') in situations, where the lack of clarity did not prejudice the case of the respondent. The legal basis for the application was s. 96 of the LRA. Although the section was not referred to in the affidavits and written submission of the applicant, the ground upon which his application was premised in substance attempted to focus on establishing the pre-requisite of 'material change in the circumstances' embodied in s. 96 of the LRA. (paras 4 & 5)

(3) Although the court may order to strike out any affidavit which is scandalous, irrelevant or otherwise oppressive under O. 41 r. 6 of the ROC, an application must first specify which part of the affidavit falls under which of the said three heads (*Wee Building Materials Sdn Bhd v. Muhamad Maidin*). However, the respondent did not specify which part of the affidavit of the applicant or that of any party was alleged to be scandalous, irrelevant or oppressive. As such, no order for striking out was entertained. (para 6)

(4) The applicant had not sufficiently proven on balance of probabilities that there had been a material change in circumstances under s. 96 of the LRA. The affidavits of the applicant contained various assertions and averments which were not accompanied with clear documentary evidence to support his application. It was difficult for the court to accept the applicant's version, especially in cases such as the present where there were conflicts of evidence on affidavit given the denials and disputations by the parties. The assertions by the applicant would qualify no more than bare statements without evidential support. (para 14)

(5) The applicant did not prepare a proper listing of his assets and liabilities as well as expenses, let alone documentary evidential support. As the party bearing the burden of proving his case, the applicant could have considered providing other forms of documentary support which could demonstrate the changes in his financial position. (para 26)

Case(s) referred to:

Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***
Lau Hui Sing v. Wong Chuo Yong [2008] 9 CLJ 232 HC ***(refd)***
Leow Kooi Wah v. Philip Ng Kok Seng & Anor [1997] 1 LNS 419 HC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***
Parkunan Achulingam v. Kalaiyarasy Periasamy [2004] 7 CLJ 175 HC ***(refd)***
Wee Building Materials Sdn Bhd v. Muhamed Maidin [1996] 1 LNS 299 HC ***(refd)***
YCC v. LSY [2007] 7 CLJ 207 HC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 52, 83, 93, 96
Rules of Court 2012, O. 1A, O. 2, O. 41 r. 6

For the applicant - KM Ong; M/s KM Ong, Lee & Co
For the respondent - Noorain Tupani; M/s Ong Ban Chai & Co

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This case concerns an application by the applicant, the former husband of the respondent, for a variation of the *decree nisi* order earlier granted on 24 August 2007 dissolving their marriage (Divorce Petition MT1-33-64-2007), in that the applicant's obligation to make monthly maintenance payments for the benefit of their two daughters (now aged 17 and 12 years) be reduced from RM5,000 to RM500.

[2] Counsels for both parties made oral submissions before this court on 21 April 2015, highlighting key arguments already in their respective written submissions filed earlier. This court received a further written submission of the applicant on 5 May 2015. I delivered this judgment on 6 May 2015.

Preliminary Objections

[3] The respondent challenged this application. Her counsel first raised the objection that the application had failed to make specific reference to the laws considered relevant as the basis of the application, other than a mere mention of s. 52 of the Law Reform (Marriage and Divorce) Act 1976. The respondent made reference to *Cheow Chew Khoon @ Teoh Chew Khoon (Yang Berniaga Sebagai Cathay Hotel) v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127 where the Court of Appeal stated as follows:

> The summons does not, as I observed very early in this judgment state any particular Rule of Court in its intitulement. Now, I think that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the Court to determine which Rule of Court the Plaintiff is invoking unless he explicitly specifies it? If a defendant and the Court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that required an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the Court. It would make a mockery of the principle that there must be no surprise in civil litigation.

> It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or Rule of Court under which the Court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

[4] I am of the view that whilst the respondent's objection is not without merit, the underlying legal basis of the applicant's application to vary the *decree nisi* was reasonably apparent and fairly easily discerned from a review of the application and supporting affidavits of the applicant. It has caused no prejudice to the respondent. Neither has the respondent been misled. There was certainly a shortcoming on the part of the applicant in the drafting of the application but this court is minded to give due regard to the justice of the case and draw on the principles underlying O. 1A and O. 2 of the Rules of Court 2012 in situations, like presently, where the lack of clarity did not prejudice the case of the respondent. Indeed, as the respondent correctly described in her written submission, the legal basis for the application is s. 96 of the Law Reform (Marriage and Divorce) Act 1976 which provides as follows:

> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[5] Although the section is unfortunately not referred to in the affidavits and written submission of the applicant, the grounds upon which his application is premised in substance attempt to focus on establishing the pre-requisite of "material change in the circumstances" embodied in s. 96 of the Act.

[6] The respondent in her affidavit also raised a second preliminary objection. This relates to statements deemed "mengaibkan" which I take to be referable to scandalous matters in affidavits. However, I am mindful that although the court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive under O. 41 r. 6 of the Rules of Court 2012, an application must first specify which part of the affidavit falls under which of the said three heads (see *Wee Building Materials Sdn Bhd v. Muhamed Maidin* [1996] 1 LNS 299; [1997] 3 AMR 2634). The respondent however does not specify which part of the affidavit of the applicant or that of any other party is alleged to be scandalous, irrelevant or oppressive. As such, no order for striking out will be entertained. Notwithstanding, the totality of the affidavit evidence proffered by both parties has been evaluated in considering the weight of the same in supporting the contention of the respective parties.

A **Grounds For Application To Vary Maintenance Order**

[7] I now consider the substance of the application proper. The salient grounds put forth by the applicant in his affidavits to support the application may be summarised as follows:

B (i) the applicant no longer has a permanent job since March 2013 nor engaged in any business, and earns only around RM2,000 a month;

(ii) he was at the time of filing this application, subjected to a civil action instituted by the respondent for arrears in payment of maintenance for their two daughters, as well as for insurance premium for their benefit,
C both pursuant to the said *decree nisi* for the period since August 2013 (Guaman Sivil No. A72-140-09/2014);

(iii) he did not have sufficient funds or savings to make payment of RM5,000 monthly, and had suggested that the joint unit trust investment of the applicant and respondent in Public Mutual Gold be
D liquidated. The respondent eventually agreed to the same, resulting in a consent judgment dated 16 December 2014, settling the arrears in payment in Guaman Sivil No. A72-140-09/2014);

(iv) the respondent, on the other hand, due to business assistance extended by the applicant previously when they were married is now a rich
E business woman, owning various assets, including cash and landed properties. She is also a director and majority shareholder of SS Image International Academy Sdn Bhd, dealing in cosmetic business. The company has a paid up capital of RM400,000 and current assets in excess of RM550,000. The respondent's monthly income attributed to
F the company is in the region of RM18,000;

(v) the applicant had, following their divorce, generously transferred his shares in Chuew Huad Company Sdn Bhd, a trading company based in Penang to the respondent, who is currently a director and the majority
G shareholder of the same. This company has a paid up capital of RM500,000, annual revenue of about RM300,000 and monthly profit of around RM25,000;

(vi) the applicant previously transferred his half share in their double storey matrimonial terrace home in Taman Perling Johor Bahru to the
H respondent whereby the purchase of the same had been funded by the applicant's income from his previous ownership of Chuew Huad Company Sdn Bhd;

(vii) the applicant has since re-married and now has a child. The respondent had subsequent to the divorce married one Mr Yeoh Joey Keng,
I formerly the employer and customer of the respondent and the applicant. Mr Yeoh Joey Keng runs a pig farming business with Kulai Farm Sdn Bhd, where he is director and majority shareholder. The

company has a paid up capital of RM5 million and current assets of around RM5.3 million, in addition to not less than five pieces of landed properties;

(viii) the applicant previously owned Bee Bee Farm Sdn Bhd, which supplied animal food items to Kulai Farm Sdn Bhd controlled by Mr Yeoh Joey Keng. The latter had even sometime in 2006 appointed the applicant to help manage Kulai Farm Sdn Bhd as a consultant, which appointment was terminated in March 2013 following the marital problem faced by the applicant. From that point, the respondent started using Chuew Huad Company Sdn Bhd to deal with Kulai Farm Sdn Bhd instead.

(ix) the respondent is well versed in accounting matters and very familiar with cosmetic business. She is far better off and richer than the applicant, with earnings from her business involvement totalling around RM50,000 monthly. From the date of the order of *decree nisi* in 2007 until around October 2013, the applicant had been paying RM7,000 monthly to the respondent (inclusive of RM2,000 for her assistance in accounting matters). Since the applicant's predicament in October 2013, he has not been able to continue making such payment and is also finding it difficult to understand why the respondent could not be considerate and accommodating to his plight, considering the applicant's previous and generous contributions to the respondent.

[8] The respondent, in her affidavit in reply affirmed that the applicant was a director of Wah Thye Biotech Sdn Bhd (formerly known as Bee Bee Farm Sdn Bhd), a company with a closing balance of RM1,034,584.95 as at 28 February 2007, and held a Public Mutual Trust of RM109,210.80 as at 30 June 2011. In addition the respondent added that the applicant also owned Public Mutual Gold unit trust investment of 200,000 units, being jointly held with the respondent. Further, the respondent stated that the applicant is also the registered proprietor of an unencumbered landed property in Taman Lagenda Putra in Kulai, Johor.

[9] It is pertinent to refer to the reaction of the applicant in his affidavit in response to the respondent's affidavit, as follows:

(a) The business of Wah Thye Biotech Sdn Bhd has since deteriorated, with monthly profit of around only RM1,200 and no dividend has been paid. The respondent's statement which referred to the company's financial position in 2007 was said to be confusing as the position in 2015 is that the company is now dormant. The Public Mutual Trust held by the company has since been liquidated given the problems faced by Bee Bee Farm Sdn Bhd. Further, the investment in Public Bank Mutual Gold had also been disposed off from which the respondent also benefited and was fully aware of.

(b) The applicant added that the unencumbered property mentioned by the respondent is the house where the applicant is presently residing. The applicant contended that the respondent's own mother, Mrs Koay Kim Huat also had to move out of the respondent's residence at Taman Perling following allegations that her mother was supporting her son (the respondent's brother), one Yeow Cheng Min, said to have been involved in cheating funds from the respondent's business. The applicant further asserted that the respondent has since ceased contact with her own family and is also going through the dissolution of her present marriage. The applicant understood that she is requesting for a huge compensation and a number of properties be transferred to her as part of the divorce proceedings.

[10] In essence, the applicant is contending that since the dissolution of their marriage, and especially following the termination of his employment with Kulai Farm Sdn Bhd around March 2013, his financial position has substantially deteriorated to the extent that he could no longer afford to continue paying RM5,000 in maintenance of the children monthly. At the same time, he is also making the assertion that the financial health of the respondent has, on the other hand, considerably improved. It will be readily appreciated that the focus on the statements made by the applicant in the affidavits primarily concern the assertion that the respondent's financial position has much improved over the years and is far better that the applicant's.

[11] In his affidavit, the applicant presented exhibits of results of company searches to support the assertions concerning the directorships and shareholdings of the respondent in SS Image International Academy Sdn Bhd and Chuew Huad Company Sdn Bhd. The search results do not however include information on the earnings of the respondent nor circumstances how she got to be involved in these entities. In any event, more crucially, the applicant did not offer any document to substantiate his own earnings and sources of income.

The Applicable Law

[12] In the first place, the law provides that consent order in divorce matters (such as in respect of this application) should, for the benefit of minor children, be rarely disturbed, unless there are exceptional circumstances, and that too must be clearly stated in the affidavit to warrant the intervention of the court (see *Lau Hui Sing v. Wong Chuo Yong* [2008] 9 CLJ 232).

[13] Further, and more importantly, the applicant, as the party making the application carries the evidential burden of satisfying the court, on balance of probabilities, that there is a material change in circumstances since the decree nisi order of 24 August 2007 that would justify the court in making the variation in maintenance on the terms applied for. It should be pointed out that s. 96 of the Law Reform (Marriage and Divorce) Act 1976 (and the

similar provision on maintenance for ex-wife found in s. 83 of the same Act) does not stipulate that the change in circumstances is related only to the party making the application. The change may therefore also concern other parties affected by the relevant child maintenance order. In addition it does not matter if the order was a *decree nisi* only, for as long as it is a subsisting order for maintenance, in situations stated in ss. 83 and 96 (see *YCC v. LSY* [2007] 7 CLJ 207).

Application Of The Law To Applicant's Case

[14] Has the applicant made out his case for a material change in circumstances? After having examined the statements made in the affidavits of parties, the key parts of which have been summarised in the earlier part of this judgment, I am persuaded to agree with the contention of the respondent's counsel that the applicant has not sufficiently proven on balance of probabilities that there has been a material change in circumstances under s. 96 of the Law Reform (Marriage and Divorce) Act 1976. The affidavits of the applicant contain various assertions and averments which should have been, but in fact not accompanied with clear documentary evidence to support his application which makes it difficult for this court to accept the applicant's version, especially in cases such as the present, where there are conflicts of evidence on affidavit given the denials and disputations by parties. In the interest of clarity, I give the following as examples where the assertions have not been proven:

(1) Applicant's assertion that his monthly earning is only around RM2,000 and that his savings is insufficient to continue making the maintenance order is not supported by any documentary evidence;

(2) Applicant's response to the respondent's assertions as to the former's financial status was also found to be wanting, including especially in the following material particulars:

   (i) The alleged deterioration in the business of Syarikat Wah Thye Biotech Sdn Bhd where the applicant is a director is not supported by any clear documentary proof;

   (ii) The assertion that Bee Bee Farm Sdn Bhd is now dormant is similarly a bare statement without more.

The above examples only concern statements actually made but not adequately substantiated. The application is also afflicted by the failure of the applicant to state matters which are required to be included and disclosed in the affidavit to support the same in the first place, such as in this case, on items of expenses, and the children's financial needs.

[15] This is certainly not a suggestion that the court cannot rely on assertions made by the deponent of an affidavit. However, the key point here is that these assertions of the applicant would qualify no more than bare statements without evidential support. There is simply insufficient evidence

on the state of the applicant's financial status to support the variation order applied for by the applicant. There is also no real attempt by the applicant to provide a complete listing, let alone a substantiated one, of all his assets (including breakdown of income and investments, if any) and liabilities, movable and immovable as well as his monthly expenses in any of his affidavits.

[16] The law is clear on the need for the party making the application for variation to show sufficient evidence to support the same. In the case of *Lau Hui Sing v. Wong Chuo Yong* [2008] 9 CLJ 232, the High Court dismissed an application by a husband petitioner seeking child maintenance contribution from the wife petitioner, by reason among others, that the ex-husband "has not disclosed his assets, movable and immovable and this material non-disclosure warrants the court to dismiss the application ...". It is noteworthy that in *Lau Hui Sing v. Wong Chuo Yong* [2008] 9 CLJ 232, the ex-husband's affidavit in support who failed in his application actually set out with reasonable clarity (and supported by relevant documentary receipts) his own as well as his children's monthly expenses. The High Court nevertheless ruled this was insufficient. In the present application by the applicant, neither the assets nor estimates of the expenses of the parties have been stated by applicant in his affidavits in the level of detail required under the law for applications of this nature.

[17] In the case of *YCC v. LSY* [2007] 7 CLJ 207, the High Court dismissed an application by the husband petitioner to vary the terms of *decree nisi* by reason, among others, that his assertion about his financial status was ruled to be equivocal and unconvincing. It is useful to quote this part of the judgment (at p. 220):

> Reverting to the issue before me, the husband says that because two judgments have been entered against him, which together amount to RM4,793,055.63, this constitutes a material change in his financial circumstances. According to his counsel, he is now in dire financial straits and even produced his bank statements to demonstrate this. I find the husband's assertion about his present financial status equivocal and unconvincing. I say so for the following reasons. First, it does not follow as a matter of course that just because there are two judgments entered against him and he has an overdraft at his bank, the husband is in dire financial straits. Whether he is or not depends on his earnings and sources of income and how his other businesses are doing: what his other liabilities are, and what other assets and investments he owns, not only in Malaysia but elsewhere. No genuine attempt has been made by the husband to disclose to the court his true financial position. In the circumstances, his assertion that the two judgments have materially changed his circumstances is equivocal. A good indication of the type of information the husband should make available to the court in an application of this nature is given in *Chua Chwee Thiam v. Annie Lim* [1989] 2 CLJ 535; [1989] 2 CLJ (Rep) 896. (Although a judgment of the Singapore High Court, I find it persuasive and relevant). In that case the

husband and wife had entered into an agreement on 20 March 1982 to make financial arrangements for the wife. On 4 June 1987 the husband applied to revoke the financial arrangements on the grounds that he was 'financially stretched', alleging that at the time he signed the agreement his business was doing well, but subsequently his company was in dire financial straits. In his affidavit, the husband there itemised his total indebtedness. He also produced evidence that his three credit cards were cancelled and that he was unable to pay his tax arrears, and that his company was placed in receivership. In the circumstances disclosed in that case the court was satisfied that the husband had produced enough evidence to show that there was a material adverse change in the husband's financial circumstances and granted his application. In doing so the court also took into account that the wife as well-off, owning two properties and expensive cars. Reverting to the facts of this case the husband has not made any real attempt to disclose to the court all relevant information regarding his present financial status.

[18] Likewise, as mentioned earlier in this judgment, I find that the applicant has not made a substantive attempt to disclose to this court all relevant information regarding his present financial health and status. I hasten to add that there is also case law authority in *Leow Kooi Wah v. Philip Ng Kok Seng & Anor* [1997] 1 LNS 419; [1997] 3 MLJ 133 which provides that failure by a party required to make the relevant disclosure under divorce proceedings may even entitle the court to draw inferences against the party on matters the subject of the shortcomings.

The Need For Disclosure Of Financial Needs Of Children

[19] This court also wishes to emphasise another important point of law relevant to this case. An application for variation of maintenance order under the Law Reform (Marriage and Divorce) Act 1976 must, given the incontrovertible *raison d'etre* of the statute, more so Part VIII of the Act (on protection of children), of which s. 96 is part, be premised on the fundamental principle of ensuring the welfare and interests of the affected children of the parties are adequately protected and be given due consideration, if not greater emphasis and priority. This principle is in consonance with judicial pronouncements in cases dealing with variation of maintenance under the Law Reform (Marriage and Divorce) Act 1976. Therefore, in exercising its power on variation, as the court may have regard to all the circumstances of the case including any change in any of the matters considered by the court when making the order to which the application on variation of child maintenance relates, the position of the children, the expenses attributed to them, and generally their financial needs must also be evaluated. It is observed that this application by the applicant is silent on this aspect. This is thus another reason why this application cannot succeed.

A **Primary Obligation Of Father To Maintain Children**

[20] Further, the High Court in *Parkunan Achulingam v. Kalaiyarasy Periasamy* [2004] 7 CLJ 175 held that s. 93 of the Law Reform (Marriage and Divorce) Act 1976 makes clear that the father has the primary obligation to maintain the children. The mother only has a secondary obligation where the
B court is satisfied it is reasonable to do so having regard to her means. Thus, the applicant in this case must not only prove his case as the applicant in a civil action, but also have to demonstrate his financial position given his status as the father of the children. This is yet another basis why I am of the view that the applicant's attempt at providing greater focus on the financial
C position of the respondent in his affidavits is somewhat misconceived and still insufficient to develop a successful case for a variation. As the father, the applicant has not been able to demonstrate the material change in his financial position. Only if this could be established, would the question on the potential liability of the respondent as the mother would have to be
D examined critically.

Rebuttal Of Statements In Affidavits

[21] In his submission, counsel for the applicant argued that it would be unnecessary for the applicant to provide documentary evidence to support
E his assertions since these were not disputed by the respondent and that in any event the requisite inference could be easily and readily drawn from these otherwise bare assertions to justify the court making the variation to the order as applied for by the applicant.

[22] However, I find that the respondent has in her affidavit in reply
F specifically denied each of the assertions made by the applicant concerning his and her financial situations. Although the applicant in his subsequent affidavit (not replied to by the respondent) in reply to the respondent's affidavit sought to clarify his financial situation in response to the statements on the applicant's financial health by the respondent, which clarification, as
G mentioned earlier, this court finds inadequate, the argument by the applicant's counsel that this affidavit has not thereafter been denied by respondent, and must therefore be deemed admitted is not entirely correct. Even though no case law was cited by the applicant's counsel, the authority of cases such as *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281 is relevant. In that case the court held that in
H evaluating affidavit evidence, "where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the facts so asserted". Whilst this is a legal principle of general application, in my view, it does not apply fully in situations where the assertions are equivocal and where they are not material
I to the application.

[23] For this purpose, I would make a general analysis on three categories of assertions made by the applicant as contained in his affidavit in reply (the ones which were not further responded to by the respondent). First are those concerning his financial position. As stated earlier, these are mainly bare assertions and not sufficiently supported by clear and documentary evidence. Even though these may not have been disputed by the respondent in her further and subsequent affidavit, it is beyond doubt that her earlier affidavit and written submission specifically made the argument, repeatedly that the applicant has not given sufficient proof of his assertions. The second category concerns those assertions referring to the respondent's alleged wealth which are also not sufficiently substantiated (other than in respect of her directorships and shareholdings). The third category involves assertions concerning the relationship of the respondent with her mother (also related to a separate affidavit affirmed by the respondent's mother) which tended to shed a negative light on the respondent, *vis-à-vis* the relationship between the respondent and her own mother, which included the allegations by her mother on the wealth of the respondent. In my view these are equivocal as well as not material to the crux of the premise of this application.

[24] Even if I am erroneous in my analysis of the applicant's argument on the effects of non-rebutted assertions in affidavits, I have no difficulty in holding that in any event, the totality of the evidence proffered by the applicant falls short of the requisite threshold to succeed in this application.

Burden On Applicant As Plaintiff To Prove His Case

[25] I should also address briefly two additional points made by the applicant. The first is the contention that based on the affidavits, it is in any event beyond all reasonable doubt that the applicant is currently facing grave financial difficulty whereas the respondent is extremely enriched. To this I will say nothing more than emphasising that the well functioning of the country's legal system requires the presence of adequate evidential support, without which the entire jurisprudence on the attainment of justice would be impaired.

[26] Secondly, it was argued that the lack of documentary support is due to the fact that the applicant is neither employed nor a business person. Thus an official statement of bank account would be entirely irrelevant, as would an employment salary slip similarly be. My response to this is that in the first place, the applicant did not even prepare a proper listing of the applicant's assets and liabilities as well as expenses, let alone documentary evidential support. As the party bearing the burden of proving his case, the applicant could have considered providing other forms of documentary support. This could include statements or letters on income tax, EPF, financing/debt arrangements, bills on expenses and others (which could demonstrate the changes in his financial position) that any plaintiff reasonably mindful of the rule on the standard of proof in a civil action would properly undertake.

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Conclusion

[27] It is worthy of further emphasis for this court to state that the applicant bears the evidential burden of proving his case on the balance of probabilities. This is a key feature in our adversarial system. A much more comprehensive and definitive disclosure on financial position of affected parties in the form of documentary evidence, as appropriate, should have been made available to ensure that the application can be properly made out and justified. In cases of this nature, the court would not readily disturb a subsisting maintenance order, given the need to protect the interest of the affected children, more so as the father is primarily responsible for the maintenance of the children.

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[28] In view of the foregoing, and for the reasons outlined above, I am not persuaded that the applicant has succeeded in establishing the case for a variation in maintenance order under s. 96 of the Law Reform (Marriage and Divorce) Act 1976 on the balance of probabilities, as the disclosure in the application is equivocal and unconvincing for lack of evidential support. This application is therefore dismissed, with costs of RM1,000 to the respondent.

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